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CITY AND COUNTY OF SAN FRANCISCO

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

CALIFORNIA RESTAURANT
ASSOCIATION,

Plaintiff,

vs.

THE CITY AND COUNTY OF SAN
FRANCISCO AND THE SAN
FRANCISCO DEPARTMENT OF
PUBLIC HEALTH,

Defendants.

Case No. C08-3247 CW

**DEFENDANT CITY AND COUNTY OF
SAN FRANCISCO'S OPPOSITION TO
PLAINTIFF'S LETTER REQUEST
FOR ENLARGEMENT OF PAGE
LIMIT FOR REPLY MEMORANDUM**

CALIFORNIA RESTAURANT
ASSOCIATION,

Plaintiff,

vs.

THE COUNTY OF SANTA CLARA
AND THE SANTA CLARA COUNTY
PUBLIC HEALTH DEPARTMENT,

Defendants.

Case No. C08-3685 CW
(Related with above case)

Defendant City and County of San Francisco ("San Francisco") hereby submits its opposition to Plaintiff California Restaurant Association's ("CRA") request, submitted by letter to this Court on August 19, 2008, for an enlargement of the page limit on its consolidated reply memorandum to an extraordinary 45 pages. This is *three times* the number of pages provided by Civil Local Rule 7-3, *ten pages longer* than its opening brief in the San Francisco action and San Francisco's opposition brief, and *fifteen pages longer* than its opening brief in the Santa Clara action. As explained below, CRA has not provided any valid reason why it is entitled to file a bloated 45-page reply brief. And although CRA has been in possession of San Francisco's opposition brief and all of the *amicus* briefs for nearly three weeks, CRA waited until only three days before its reply brief is due to file this letter request, flouting the procedures established under the Civil Local Rule 7-11 to deal with just such requests. For these reasons, CRA's request for permission to file a 45-page reply brief must be denied.¹

I. CRA HAS PROVIDED NO VALID REASON WHY IT NEEDS AN EXTRAORDINARY 45-PAGES FOR ITS REPLY BRIEF

CRA and San Francisco, as well as this Court, have already considered the appropriate page limits for briefing on CRA's preliminary injunction motion.. On July 3, 2008, San Francisco and CRA filed a stipulation with this Court setting forth the briefing schedule and the page limits for *California Restaurant Association v. City and County of San Francisco* (the "San Francisco case"). Pursuant to the July 3, 2008 stipulation, each party was given up to 35 pages for their opening and opposition briefs. When negotiating the terms of the July 3rd stipulation, the parties discussed the likelihood that the same parties that submitted *amicus* briefs in the New York City menu labeling litigation may submit similar *amicus* briefs in support of San Francisco. Nonetheless, at no time during these discussions did CRA request additional pages for its reply brief. Declaration of Tara Steeley at ¶ 1 ("Steeley Decl.").

¹ San Francisco does not contest CRA's request to file a consolidated reply brief or its request that all parties in the San Francisco and Santa Clara cases participate in the hearing scheduled for August 28, 2008. As requested by the Court in its August 15, 2008 order, San Francisco has filed a notice stating its intention to appear at the hearing on August 28, 2008 and its consent to vacate the hearing scheduled for September 4, 2008.

1 Nearly seven weeks later, on Monday August 18, 2008, Plaintiff's counsel telephoned San
2 Francisco's counsel asking the City to stipulate to an enlarged 40-page limit for CRA's reply brief *for*
3 *the San Francisco case alone*. When asked to explain, CRA referenced the number of pages filed by
4 *amici*, but could not identify any new or unexpected arguments in the *amicus* briefs that were not
5 already addressed in CRA's moving papers. The *amicus* briefs support the arguments set forth in San
6 Francisco's opposition; they do not raise new ones. CRA is responding to San Francisco's 35-page
7 opposition, not 170 pages. For these reasons, San Francisco refused to stipulate to 40 pages. Steeley
8 Decl. at ¶ 2.

9 The next day, Tuesday August 19, 2008, Plaintiff's counsel sent an email to counsel for both
10 San Francisco and Santa Clara asking them to stipulate to a 45-page limit for a consolidated reply
11 brief in both cases. Steeley Decl. at ¶ 3. Both San Francisco and Santa Clara responded that given
12 the identical legal issues and nearly identical factual issues presented in both cases, they could not see
13 the need for 45 pages for the consolidated reply brief. Both San Francisco and Santa Clara offered 25
14 pages for the consolidated reply brief. Steeley Decl. at ¶¶ 4, 5.

15 Ignoring San Francisco and Santa Clara's reasonable offer of 25 pages, CRA then filed a letter
16 with this Court seeking 45 pages for its reply brief. In making this request, CRA relies solely on the
17 number of pages submitted by *amici* in support of San Francisco. CRA does not even attempt to
18 identify any new arguments made in the *amicus* briefs that would justify the need for a 45-page reply
19 brief. Nor could CRA make this showing, given that the *amicus* briefs support the arguments made
20 by San Francisco, but do not offer new arguments.

21 In addition, long before they filed their opening brief in this case, CRA's counsel was in
22 possession of *identical* or *nearly identical* *amicus* briefs filed by the *same amici* in the menu labeling
23 litigation in New York City. Thus, CRA could have, and in fact did, address the arguments made by
24 the *amici* in its opening brief in the San Francisco case. *See* Pl. Mem. of Points & Authorities, at 10
25 (addressing arguments made by "New York City and its *amici*"); at 14-20 (addressing argument made
26 in the FDA's *amicus* brief). CRA's assertion that it now needs 45 *pages* to rehash these arguments
27 rings hollow.

1 The only conceivable reason that CRA could need 45 pages for its reply brief is in order to
 2 introduce new arguments in its reply, a practice this Court has recognized is improper. *See Litmon v.*
 3 *Santa Clara County*, 2008 WL 2242307 at *7 n.1 (N.D.Cal. May 29, 2008) (party may not raise new
 4 argument for first time in a reply brief).

5 **II. CRA'S LETTER REQUEST VIOLATES CIVIL LOCAL RULE 7-11**

6 Civil Local Rule 7-11 provides the procedure for requesting "administrative relief" such as "to
 7 exceed otherwise applicable page limitations." Civ. L. Rule 7-11. The rule requires the requesting
 8 party to file a motion, supported by a stipulation or a declaration, setting forth the "action requested
 9 and the reasons supporting the motion." *Id.* Opposing counsel then has three days to oppose the
 10 request, and the request is deemed submitted to the Court on the fourth day.² Civ. L. Rule 7-
 11 11(b)&(c). Counsel for CRA is well aware of this requirement, as it has already filed administrative
 12 motions under Rule 7-11 in these related cases.

13 Nonetheless, CRA flouted this rule by submitting a *letter* to this Court only *three days* before
 14 their reply brief was due. Nowhere in its letter does CRA justify its departure from the local rules.
 15 Although CRA now complains that it needs additional pages in order to respond to the *amicus* briefs
 16 filed in support of San Francisco, CRA received all of those briefs nearly three weeks ago, and has
 17 been aware of most if not all of *amici's* arguments ever since *amici* filed their *amicus* briefs in the
 18 New York City action many months ago. Clearly, CRA has been on notice of the number of pages
 19 filed and easily could have filed an administrative motion in a timely manner. By ignoring this
 20 Court's rules and procedures, CRA has forced San Francisco to hurriedly oppose its improper request
 21 and seeks to force this Court to act before it is even proper to do so under the local rules. Civ. L.
 22 Rule 7-11(c). CRA's gamesmanship should not be rewarded.

23
 24
 25 ² Had CRA followed Rule 7-11's requirements and filed a motion for administrative relief
 26 yesterday rather than a letter, San Francisco would have until Friday August 22, 2008 to file its
 27 opposition to that motion. Civ. L. Rule 7-11(b). In the interest of a timely resolution of this matter,
 however, San Francisco is filing its opposition earlier than is required by the local rules.

1 Dated: August 20, 2008

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